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18 *Attorneys for Defendants C. R. Bard, Inc. and*
Bard Peripheral Vascular, Inc.

19 UNITED STATES DISTRICT COURT

20 DISTRICT OF ARIZONA

21 IN RE: Bard IVC Filters Products Liability
22 Litigation,

23 No. 2:15-MD-02641-DGC

24
25 THE PARTIES' JOINT STATUS
REPORT FOR THE NOVEMBER 17,
26 CASE MANAGEMENT
CONFERENCE

27
28

1 In accordance with Paragraph G of Case Management Order No. 27 [Doc. 8133],
2 the Parties hereby submit their Joint Status Report for the November 17, 2017 Case
3 Management Conference.

4 **I. Discovery**

5 A. MDL Common Discovery

6 The Parties completed MDL common discovery on February 3, 2017. The
7 following depositions have been completed:

8	December 15, 2015	30(b)(6) re FDA Warning Letter
9	January 11, 2016	Kay Fuller
10	January 20, 2016	Continued 30(b)(6) re FDA Warning Letter
11	March 18, 2016	30(b)(6) re corporate structure
12	April 27, 2016	30(b)(6) re ESI systems structure
13	May 3, 2016	Murray Asch, M.D.
14	May 11, 2016	Carol Vierling
15	May 17, 2016	Anne Bynon
16	May 24, 2016	Len DeCant
17	June 2, 2016	John DeFord
18	June 9, 2016	Bret Baird
19	June 16, 2016	Robert DeLeon
20	June 17, 2016	Joe DeJohn
21	July 18, 2016	Abithal Raji-Kubba
22	July 27, 2016	Bill Little
23	July 27, 2016	Judy Ludwig
24	July 29, 2016	John Wheeler
25	August 9, 2016	Maureen Uebelacker
26	August 16, 2016	Daniel Orms
27	August 19, 2016	Mary Edwards
28	August 24, 2016	Cindi Walcott

1	August 30, 2016	30(b)(6) re REACH program
2	September 7, 2016	Steve Williamson
3	September 7, 2016	30(b)(6) re Sales/Marketing
4	September 7, 2016	Kevin Shifrin
5	September 16, 2016	Jack Sullivan
6	September 19, 2016	Brian Doherty
7	September 23, 2016	Holly Glass
8	September 29, 2016	John Van Vleet
9	October 11, 2016	Chris Ganser
10	October 18, 2016	Natalie Wong
11	November 3, 2016	Jack Sullivan (continued)
12	November 11, 2016	Robert Cortelezzzi
13	December 6, 2016	David Peeler, M.D.
14	January 4, 2017	John Kaufman, M.D.
15	January 18, 2017	Michael Randall - 30(b)(6) Meridian/Denali
16	January 18, 2017	Kim Romney
17	January 19, 2017	Robert Carr - 30(b)(6) Key Opinion Leaders
18	January 20, 2017	Scott Trerotola, M.D.
19	January 24, 2017	Scott Randall
20	January 25, 2017	Gary Cohen, M.D.
21	January 26, 2017	Chad Modra - 30(b)(6) Failure Rate Thresholds
22	January 26, 2017	Anthony Venbrux, M.D.
23	January 30, 2017	Frank Lynch, M.D.
24	January 31, 2017	Mark Wilson
25	February 1, 2017	William Stavropoulos, M.D.
26	February 2, 2017	Mike Randall
27	February 2, 2017	Kevin Boyle
28	June 6, 2017	Rob Carr (Preemption Declaration)

1 B. MDL Expert Disclosure and Discovery

2 Plaintiffs made their initial disclosures of expert witnesses on March 3, 2017, and
3 their initial disclosures relating to the Meridian and Denali devices on April 7, 2017.
4 Those disclosures included the following witnesses:

5 David W. Bates, M.D., MSc

6 Rebecca Betensky, Ph.D.

7 Mark J. Eisenberg, M.D.

8 David Garcia, M.D.

9 Steven M. Hertz, M.D.

10 Sanjeeva Kalva M.D.

11 David A. Kessler, M.D.

12 Thomas Kinney, M.D., M.S.M.E.

13 Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME

14 Robert O. Ritchie, Ph.D.

15 Suzanne Parisian, M.D.

16 Anne Christine Roberts, M.D.

17 Michael B. Streiff, M.D.

18 Robert L. Vogelzang, M.D.

19 Defendants made their initial disclosures of expert witnesses on April 14, 2017,
20 and their initial disclosures relating to the Meridian and Denali devices on May 12, 2017.

21 Those disclosures included the following witnesses:

22 Christine L. Brauer, Ph.D.

23 Paul Briant, Ph.D., P.E.

24 Audrey A. Fasching, Ph.D., P.E.

25 David W. Feigal Jr., M.D., M.P.H.

26 Clement J. Grassi, M.D.

27 Mark W. Moritz, M.D.

28 Christopher S. Morris, M.D.

1 Frederick B. Rogers, M.D., FACS

2 Moni Stein, M.D., FSIR

3 Ronald A. Thisted, Ph.D.

4 Donna Bea Tillman, Ph.D., M.P.A.

5 Plaintiffs made their rebuttal disclosures of expert witnesses on May 12, 2017.

6 Those disclosures included the following witnesses:

7 Rebecca Betensky, Ph.D.

8 Kush Desai, M.D.

9 Mark J. Eisenberg, M.D.

10 Steven M. Hertz, M.D.

11 Robert M. McMeeking, Ph.D.

12 Robert O. Ritchie, Ph.D.

13 Robert L. Vogelzang, M.D.

14 The following expert depositions have been taken:

15 May 9, 2017 David W. Bates, M.D., MSc (class-action)

16 May 16, 2017 Steven M. Hertz, M.D. (class-action)

17 May 17, 2017 Christopher S. Morris, M.D.

18 June 5, 2017 Robert L. Vogelzang, M.D.

19 June 6, 2017 Kush Desai, M.D.

20 June 9, 2017 Robert O. Ritchie, Ph.D.

21 June 15, 2017 Clement J. Grassi, M.D.

22 June 17, 2017 Thomas Kinney, M.D., M.S., M.E.

23 June 21, 2017 David L. Garcia, M.D.

24 June 21, 2017 Suzanne Parisian, M.D.

25 June 21, 2017 Anne Christine Roberts, M.D.

26 June 23, 2017 Rebecca Betensky, Ph.D.

27 June 26, 2017 Audrey Fasching, Ph.D., PE

28 July 6, 2017 Mark J. Eisenberg, M.D., MPH, FACC, FAHA

1	July 6, 2017	Robert M. McMeeking, Ph.D., NAE, FREng, FRSE, LFASME
2	July 7, 2017	Anne Christine Roberts, M.D.
3	July 11, 2017	Sanjeeva Kalva, M.D.
4	July 12, 2017	Michael B. Streiff, M.D.
5	July 13, 2017	Paul Briant, Ph.D, PE
6	July 18, 2017	Mark W. Moritz, M.D.
7	July 18, 2017	Frederick B. Rogers, M.D., MS, FACS
8	July 20, 2017	David W. Feigal, Jr., M.D., MPH
9	July 21, 2017	Dr. Darren R. Hurst
10	July 24, 2017	Dr. Derek D. Muehrcke
11	July 25, 2017	Christopher S. Morris, MD
12	July 26, 2017	J. Matthew Sims, MC, MS
13	July 26, 2017	Dr. Kenneth Herbst
14	July 28, 2017	Ronald A. Thisted, Ph.D.
15	July 31, 2017	David A. Kessler, M.D.
16	July 31, 2017	Moni Stein, MD
17	August 2, 2017	Christine L. Brauer, M.D., Ph.D.
18	August 3, 2017	Paul Briant, Ph.D., PE
19	August 3, 2017	Audrey Fasching, Ph.D.
20	August 3, 2017	David S. Poll, MD
21	August 4, 2017	Robert O. Ritchie, Ph.D.
22	August 4, 2017	Donna Bea Tillman, Ph.D.MPA, FRAPS
23	August 16, 2017	Lora K. White, RN, BSN, CCM, CNLCP
24	August 25, 2017	Dr. Daniel Cousin
25	September 29, 2017	Dr. Piotr Sobieszczyk
26		
27		
28		

1 C. *Barazza Class Action Discovery*

2 The Parties completed the depositions of the named plaintiffs. The following
 3 depositions were taken:

4	October 19, 2016	Diane Washington
5	October 28, 2016	James Holt
6	November 10, 2016	Gregory Lester
7	November 16, 2016	Maria Barazza
8	November 30, 2016	Edward Mims
9	December 1, 2016	Nancy Mosher
10	December 6, 2016	Thomas Flournay
11	December 6, 2016	Delmar Lee Peck
12	December 15, 2016	Denise Tomlin
13	January 24, 2017	John Van Vleet
14	February 27, 2017	Linda Walker
15	May 11, 2017	Ana Hernandez

16 The Parties designated and disclosed experts on class certification issues, including
 17 Plaintiffs' rebuttal expert reports. Many of those class certification experts were also the
 18 same experts in the general MDL and were deposed at the same time for both the MDL
 19 and the class action.

20 D. *Bellwether Group 1 Depositions*

21 1. *Fact Discovery*

22 In addition to the numerous fact witness depositions taken by the Parties before the
 23 last status conference, the Parties have scheduled or have already taken the following fact
 24 witness depositions in the five bellwether cases since that status conference:

25	May 31, 2017	Angelic Thompson (Mulkey)
26	May 31, 2017	Lorelie Thompson (Mulkey)
27	May 31, 2017	Torin Walters, M.D. (Mulkey)
28	June 1, 2017	Pho Nguyen, M.D. (Mulkey)

1 June 15, 2017 Brandon Kang, M.D. (Booker)
2 June 20, 2017 Richard Harvey, M.D. (Booker)
3 June 26, 2017 Eric Hairston (Booker)
4 June 27, 2017 Brody Puckett (Kruse, postponed due to illness)
5 July 7, 2017 Amy Sparks, M.D. (Hyde)
6 July 11, 2017 Colleen Taylor, M.D. (Jones)
7 July 12, 2017 Aaron Donner (Mulkey)
8 August 3, 2017 Chris Smith (Jones)
9 August 15, 2017 Bryan Vogel (Booker and Kruse)
10 August 23, 2017 Tim Hug (Hyde)

11 Per CMO 25 (Doc. 6227), the deadline for deposing medical witnesses (treating
12 physicians) was August 7, 2017, and the deadline for deposing all other fact witnesses was
13 August 15, 2017.

14 2. Case-Specific Expert Disclosures and Discovery

15 On June 5, 2017, Plaintiffs disclosed case-specific expert reports by the following
16 expert witnesses in all five bellwether cases:

17 Darren Hurst, M.D.

18 Derek D. Muehrcke, M.D.

19 On June 5, 2107, Plaintiffs disclosed the case-specific expert report of David
20 Garcia, M.D. in the Jones bellwether case.

21 On June 9, 2017, in accordance with the agreement of the Parties, Plaintiffs
22 disclosed case-specific expert reports by Robert M. McMeeking, Ph.D., NAE, FREng,
23 FRSE, LFASME in all five bellwether cases.

24 On June 12, 2017, in accordance with the agreement of the Parties, Plaintiffs
25 disclosed case-specific expert reports by the following expert witnesses in all five
26 bellwether cases:

27 Robert O. Ritchie, Ph.D.

28

1 J. Matthew Sims, MC, MS & Lora K. White, RN, BSN, CNLCP, CCM,
2 MSCC

3 On July 3, 2017, Defendants disclosed case-specific expert reports for the
4 following expert witnesses:

5 Kenneth D. Herbst, M.D.

6 Mark W. Moritz, M.D.

7 Christopher S. Morris, M.D.

8 Moni Stein, M.D., FSIR

9 On July 13, 2017, in accordance with agreement of the parties, Defendants
10 disclosed case-specific expert reports for the following expert witnesses:

11 Audrey A. Fasching, Ph.D.

12 Paul Briant, Ph.D

13 Daniel Cousin, M.D.

14 David Poll, M.D.

15 Piotr Sobieszczyk, M.D.

16 All general MDL deposition discovery and all depositions related to the initial five
17 bellwether cases have been completed (subject to this Court's resolution of the disputes
18 identified below).

19 **II. Science Day Procedure**

20 The Parties made their Science Day presentations on October 5, 2019 as described
21 in CMO 27.

22 **III. Bellwether Trials Issues**

23 In paragraph H of CMO 26, the Court advised the Parties that it will, at the
24 upcoming status conference, address the scheduling of bellwether trials. At the October 5,
25 2017 CMC the Court selected the initial order of the Group I bellwether trials and
26 scheduled them as reflected in paragraph C of CMO 27. The parties note their respective
27 positions on those issues below.

1 **Plaintiffs' Position**

2 Plaintiffs will be prepared to discuss with the Court issues relating to the setting of
3 the bellwether cases for trial, specifically “stacking” or “next case up” approach similar to
4 that which is being followed in the Arizona state court consolidated Bard IVC cases. *See*
5 Exhibit A, paragraph A, page 2. This approach will ensure a true bellwether process, that
6 is, if a case is resolved, the next-trial ready case will be tried in that slot. For example, the
7 Court has set the Booker trial starting March 13, 2017. In the event it settles, the Jones
8 case will take the March 13, 2017 slot. This approach will also ensure judicial economy.

9 Plaintiffs also request a discussion regarding the following bellwether trial issues:

- 10 1. **Scheduling of Jones Pre-Trial Motions** – specifically, the schedule for
11 Jones-specific motions to be heard in advance of the March 13, 2017 trial
12 slot in the event that the Booker case resolves.
- 13 2. **The balance of Group 1 bellwether cases** – specifically, regarding keeping
14 the balance of the Group 1 bellwether cases trial-ready in the event that
15 Booker and Jones cases resolve prior to the currently slated March 13th trial
16 date.
- 17 3. **The balance of Group 2 bellwether cases** – specifically, a schedule to
18 complete discovery in the following Discovery Phase 1 bellwether cases to
19 ensure the readiness for trial in 2018: Mixson, Tinlin, Peterson, Nelson,
20 Dewitt.
- 21 4. **The ten (10) Mature/Early Remand cases** – specifically, Plaintiffs request
22 that completion of discovery in these previously identified “mature cases” is
23 scheduled so that they may be ready for remand back to their transferor
24 jurisdictions once all *Daubert* rulings have been issued by this Court listed
25 below:
 - 26 1. Cason, Pamela
 - 27 2. Coker, Jennifer
 - 28 3. Ebert, Melissa

- 1 4. Fox, Susan
- 2 5. Henley, Angela
- 3 6. Keen, Harry
- 4 7. Ocasio, Denise
- 5 8. Rivera, (McClarty), Vicki
- 6 9. Smith, Erin
- 7 10. Tillman, Leslie

8 **Defendants' Position**

9 Bard responds to the Plaintiffs' suggestions, as follows:

10 (a) **The March 13th Trial Setting:** As a general concept, Bard does not
11 necessarily oppose the notion of "stacking" the Booker and Jones cases, i.e.
12 having the Jones case prepared to proceed to trial if the Booker case resolves on
13 that date. However, as a practical matter, Bard is concerned that such a
14 schedule may not be feasible for the parties and particularly the Court. There
15 are already numerous Daubert motions that need to be heard and decided before
16 the Booker case commences trial, and some of those motions will not be heard
17 until mid-January. There is also a motion for summary judgment motion in
18 Booker to be decided. In addition, there will be a number of motions in limine
19 filed by both sides to be decided prior to the beginning of trial. To achieve the
20 "stacking" the Plaintiffs are requesting would require the Court to resolve a
21 second set of motions in limine (some of which will be duplicative but many of
22 which will not) and the Jones summary judgment motion by the same date.
23 Such an aggressive schedule may not be feasible for either the parties or the
24 Court.

25 (b) **The "Second" Group of Bellwether Cases:** The Plaintiffs unilaterally refer to
26 the cases not chosen for the initial bellwether group as a "second" group of
27 bellwether cases. However, that group of cases has never been designated by
28 the Court or any of the past Case Management Orders as a second group of

bellwether cases. To the contrary, many of those cases (including some cases selected by Plaintiffs and some cases selected by Bard) were ultimately rejected as bellwether cases because they were not sufficiently representative of the MDL inventory or because they had “outlier” facts. Bard believes it would be contrary to the entire purpose of the bellwether process (i.e, the trial of representative cases to permit the assessment of case values) to now restore those cases to bellwether status.

That said, Bard agrees that it would be prudent to have a second set of bellwether cases trial-ready by late 2018. To that end, Bard would suggest that the parties meet and confer about a proposed case management order detailing that selection process, and submit that proposed order to the Court on or before December 1, 2017.

(c) **“Mature” Cases:** Bard agrees that some additional discovery remains to be completed in the “mature” cases before they are ready for trial. The question is whether that discovery should be undertaken now or after the cases are remanded (presumably in the Spring of 2018 after the Daubert motions have been decided). The discovery remaining to be accomplished in these cases is all case-specific. Hence, Bard believes that the discovery should be undertaken once the cases are remanded and the cases are returned to the jurisdiction of the judges who will preside over the trials of those cases. Those judges will all likelihood be unable to provide the parties with immediate trial dates after remand, and as a result, there will be ample time then to complete the targeted amount of discovery that remains to be accomplished. Given that fact, Bard believes there is no need to distract the parties (and even this Court, if disputes arise) with conducting this discovery while final preparations are being made for the first MDL bellwether trial.

1 **IV. Summary Judgment and Daubert Motions**

2 The Parties have filed their *Daubert* and summary judgment motions in accordance
 3 with CMO 23 and this Court's August 31, 2017, Order [Doc. 7368]. A schedule for
 4 Daubert and Summary Judgment arguments to be heard has been submitted to the Court in
 5 accordance with CMO 27. The Court has since altered the schedule *sua sponte* due to
 6 changes in its schedule. The parties are ready to argue the Defendants' Motion for
 7 Summary Judgment as to Federal Preemption and Defendants' Motion for Summary
 8 Judgment in the Booker case on November 17, 2017.

9 **Plaintiffs' Position**

10 Plaintiffs request a revised schedule for the motions to be heard at the December
 11 15, 2017 hearing.

12 **Defendants' Position**

13 Bard will be ready to discuss the Court's scheduling preferences for the remaining
 14 motions.

15 **V. Motions in Limine**

16 Historically the parties have submitted generic and case-specific pre-trial motions
 17 *in limine* for pre-trial rulings.

18 **Plaintiffs' Position**

- 19 1. Plaintiffs request a schedule for pre-trial motions *in limine* including (1) a date
 20 by which the parties will identify and confer about disputed evidentiary issues
 21 that they anticipate will be the subject of motions *in limine*, and (2) deadlines
 22 for filing and responding.
- 23 2. One of the generic motions *in limine* that Plaintiffs intend to file will be their
 24 “*Cisson FDA*” motion seeking exclusion of certain FDA-related evidence¹.

25
 26 ¹This issue was recently addressed by the Eleventh Circuit in *Eghnayem v. Boston*
 27 *Scientific, Inc.*, 2017 WL 4681345, at *6 (11th Cir. Oct. 19, 2017), and previously by the
 28 Fourth Circuit in *In re C.R. Bard, Inc., MDL No. 2187, Pelvic Repair Sys. Prods. Liab. Litig.*, 810 F.3d 913 (4th Cir. Jan. 14, 2016). This issue was also recently addressed in the
 Cook IVC Filter MDL. (See, Doc. 8032).

1 Plaintiffs request an early ruling on their “*Cisson FDA*” motion *in limine* as this
2 ruling will affect both parties’ trial preparation with regard to which witnesses
3 will be called and for how long, as well as which portions of video-taped
4 depositions will be/can be played at trial. Plaintiffs are prepared to file this
5 motion within five (5) days of this Court’s ruling on the matter.

6 **Defendants’ Position**

7 Bard will be prepared to discuss the Court’s preferences for the handling of
8 motions in limine. Bard is concerned, however, about the Plaintiffs’ effort to expedite
9 that process, simply because of the number of summary judgment and Daubert motions
10 that have to be addressed first. In the event the Court decides to entertain the Plaintiffs’
11 “Cisson” motion at an earlier stage, Bard also has one motion in limine it would like to
12 file at that time because of its similar potential impact on trial preparation.

13 **VI. Trial Readiness**

14 **Plaintiffs’ Position**

15 Plaintiffs request the Court establish a schedule for lead trial counsel to meet and
16 confer about trial and evidentiary issues including witness availability and other potential
17 scheduling conflicts, and other uniform preparation between the parties of certain pre-trial
18 matters that may affect the Court’s scheduling of bellwether trials. Other subjects for the
19 meeting should include master uniform exhibits lists, trial time per side, live versus video
20 testimony, pre-admitted evidence.

21 **Defendants’ Position:** The plaintiffs have raised the issue of a meeting between
22 counsel at past conferences, and Bard’s counsel has repeatedly indicated a willingness to
23 meet with the Plaintiffs’ counsel to discuss trial logistics. However, Bard is uncertain as
24 to what the Plaintiffs are referencing when they mention “other uniform preparation
25 between the parties of certain pre-trial matters that may affect the Court’s scheduling of
26 bellwether trials.” It is Bard’s understanding that the Court has scheduled two bellwether
27 trials, and will schedule others, and it should be incumbent on the parties to be prepared
28 for those dates.

Respectfully submitted this 14th day of November 2017.

GALLAGHER & KENNEDY, P.A.

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to all attorneys of record.

s/Wendy Espitia